

UNITED STATES DEPARTMENT OF ENERGY
Office of Environment, Safety and Health
Office of Health (EH-5) .

In the Matter of:	*
10 CFR 851 - Worker	*
Safety and Health	*
Notice of Proposed	*
Rulemaking (NOPR)	*

Docket No. EH-RM-03-WSH

Wednesday,
February 4, 2004

DOE National Renewable Energy Lab
Visitor Center Auditorium
15013 Denver West Parkway
Golden, CO

The above-entitled matter came on for
hearing, pursuant to notice at 9:00 a.m.

BEFORE: JACQUELINE ROGERS,
Presiding Official

ALSO PRESENT:

BEN MCRAE, Assistant General Counsel
ROY GIBBS, Industrial Hygienist
BOB BISTLINE

A G E N D A

PRESENTATION:	PAGE:.
Jacqueline Rogers	3
Bill Madia	6
Sylvia Kieding	11
John Ahlquist	20

P R O C E E D I N G S

MS. RCGERS: Into the record. Good morning, and I would like to welcome you all. I am Jacqueline Rogers, an industrial hygienist, in the Office of Worker Protection Policies and Program, which is EH-52. That office is in the Office of Environment, Safety, Health. On behalf of the Department of Energy, I would like to thank you for taking the time to participate in this public hearing, concerning the proposed Workers and Health Safety Rules.

I would like to especially thank you all for traveling in the snow to come to the Public Hearing. I am in the Washington, D.C. Office, via tele video.

The purpose of this hearing is to receive oral testimony from the public on DOE's Notice of Proposed Rulemaking. Your comments are not only appreciated, they are essential to the process. The comments received here today and those submitted during the written comment period within our February 6, 2004, will assist the Department in the rulemaking process. All written comments must be received by this due date to ensure consideration by DOE. The address for sending comments is Jacqueline D. Rogers, U.S. Department of Energy, EH-52/270 Corporate Square Boulevard. Docket Number EH-RM-03-WHS, 1000

1 Independence Avenue, S.W. , Washington, D.C.
2 20585-0270. Also comments can be filed electronically
3 on the website established for this rulemaking process.

4 The Internet website address is located at
5 <http://www.eh.doe.gov/whs/rulemaking>.

6 As the deciding official of this hearing, I
7 would like to set forth the guidelines for conducting
8 the hearing and provide other pertinent information.

9 This is an event to try or judiciary hearing.

10 It will be conducted in accordance with the Section
11 553 of the Administrative Procedures Act, 5 U.S.C.
12 Section 553 and Sections 501 of the DOE Organization
13 Act, 42 U.S.C. Section 7199. To provide the
14 Department with as much pertinent information as many
15 of you as can legally be obtained, and to obtain
16 enabled interested persons to express their views, the
17 hearing will be conducted in accordance with the
18 following procedures:

19 The speakers will be called to testify in the
20 order indicated on the agenda. Speakers have been
21 allotted 10 minutes for the verbal statements. Any one
22 may make an unscheduled oral statement after all
23 scheduled speakers have delivered their statements. To
24 do so, please, submit your name to Bob Bistline at the
25 desk before the conclusion of the last scheduled

speaker. And at the conclusion of all presentations,
2 scheduled speakers will be given the opportunity to
3 make a rebuttal or clarifying statements. To do so,
4 please, give your name to Bob Bistline, again.

5 Only members of the DOE Panel conducting the
6 hearing will be allowed to ask questions for the
7 speakers.

8 In approximately 20 days a transcript of this
9 hearing will be available for inspection and copying on
10 the website at <http://www.eh.doe.gov/whs/rulemaking>.
11 As mentioned earlier, the comment period will close on
12 February 6, 2004. All written comments received will
13 be made available for public inspection at the end of
14 that web address. Three copies of the comments are
15 requested. If you have any questions regarding the
16 submission of comments, please call me on (301)
17 903-5684.

18 Any persons submitting information which he
19 or she believes to be confidential as by law from
20 public disclosure, should submit to the Washington,
21 D.C. office comment address a total of four copies, one
22 complete copy with the confidential information
23 included and three copies without the confidential
24 information. In accordance with the procedures
25 established in 10 CFR 1004.11, the Department of Energy

1 shall make its own determination as to whether or not
2 the information shall be exempted from public
3 disclosure.

4 We appreciate the time and effort you have
5 taken in preparing your statement and I am pleased to
6 receive your comments.

7 Now, I would like to introduce the panel to
8 you. I am here in the Washington, D.C. Office, and Eob
9 Bistline is there at Inrail in Golden, Colorado with
10 you.

11 And now I would like to call the first
12 speaker, for the record, I am asking that each speaker
13 to state his or her name and whom you represent before
14 making your statement. Thank you. And the first
15 speaker will be Bill Madia from Battelle Memorial
16 Institute.

17 PRESENTATION BY BILL MADIA:

18 MR. MADIA: Good morning, my name is Bill
19 Madia, I am Executive Vice President for Laboratory
20 Operations for Battelle Memorial Institute.

21 While I have worked for Battelle for nearly
22 30 years, for the past 18 years I have been the
23 Director of Major Research Laboratories, the two most
24 recent being Department of Energy, National
25 Laboratories.

1 I am here today to convey our comments on
2 DOE's proposed approach to responding to the direction
3 Congress gave DOE at the National Defense Authorization
4 Act.

5 This direction specifically asks DOE to
6 promulgate regulations for industrial and construction
7 health and safety at DOE's facilities. DOE has chosen
8 to comply with this direction by proposing a new worker
9 health and safety regulatory approach that involves
10 creation of multiple site specific safety regulations
11 in untested enforcement process.

12 We believe there is another approach that
13 better protects the worker, better serves DOE and
14 provides contractors with more confidence in its
15 enforcement. For over 30 years the Occupational
16 Safety and Health Administration or OSHA has carried
17 out the responsibility to establish and administer
18 rules to keep American work places and workers safe.
19 From my own experience, I can tell you the hazards
20 faced by workers in the DOE laboratories, are not
21 different from those faced by workers at Battelle's
22 private laboratories in the U.S. and in Europe.

23 I believe transitioning to external
24 regulation by OSHA is an approach that is both
25 responsive to congressional direction discussed

1 earlier, and additional direction provided by the House
2 Energy and Water Appropriation Committee, to transition
3 to external regulation, for the DOE Office of Science
4 Laboratories.

5 There are a number of benefits from having
6 DOE facilities operate under OSHA's regulatory
7 framework. First, DOE's contractors will be held
8 accountable to the same workers safety regulations that
9 apply to all other American work places, thus,
10 eliminating the concern expressed by many about DOE's
11 "self regulation". DOE and its contractors would gain
12 a great deal of credibility if the set of national
13 standards currently applied in over 4,000 like
14 industries, was the cornerstone for workers safety and
15 health at all DOE facilities. And those standard were
16 enforced by the same rules imposed in all other work
17 places. It is my personal experience that workers have
18 a strong confidence in OSHA.

19 Second, under OSHA, there is a well
20 documented and understood process for promulgating and
21 interpreting regulations. This process draws upon the
22 experience base and practices of the entire U.S.
23 commercial business sector and leads to a highly
24 uniformed and predictable regulatory environment.

25 Third, based on my experience in operating

1 both DOE regulated facilities and OSHA regulated
2 facilities, I believe that major cost savings, perhaps
3 as much as 25 to 30 percent, might be possible, while
4 enhancing the safety culture of performance within the
5 DOE complex.

6 Finally, the OSHA process for dispute
7 resolution is well tested and understood. There exists
8 a large body of administrative and judicial
9 interpretation of OSHA rules that brings clarity and
10 finality in resolving disputes. DOE's proposal for
11 enforcement and dispute resolution is not clear, will
12 have no experience base and fail to take advantage of
13 30 years of interpretation and implementation found in
14 OSHA.

15 Because of these benefits, I urge DOE to
16 rethink their proposed approach. DOE should adopt OSHA
17 standards and the OSHA enforcement process. The
18 proposed rule will result in the continued perception
19 of DOE self regulation. it will increase the
20 administrative costs for managing worker safety, and
21 have significant uncertainties associated with the
22 proposed enforcement process.

23 In addition, it is difficult for me to
24 understand how this proposed approach is consistent
25 with Under Secretary Robert Card's principals outlined

1 in its April 30, 2002 memorandum regarding Office of
2 Science Laboratory contracts. That memorandum states
3 and I will quote, "DOE shall rely primarily on federal,
4 state and local laws, regulations and national
5 standards to establish contractor requirements and
6 performance criteria, while limiting the use of DOE
7 directives and guidance to unique Department functions
8 where is no industrial process counterpart."

9 The proposed 10 CFR 851 rules do not adopt or
10 model existing and accepted national standards.

11 In summary, based upon my experience in
12 managing laboratories regulated both by OSHA and DOE, I
13 believe that the proposed approach will add complexity
14 and not result in actual improvements in worker safety.
15 I believe each of the two directives by Congress on
16 workers safety has arisen at least in part from a
17 frustration with DOE's existing self regulatory
18 practices. This proposed rule does nothing to address
19 this issue, in fact, I believe it will acerbate it.

20 While I understand this rulemaking is not a
21 proposal for external regulation, Battelle contends
22 that the best way to respond to this legislature is to
23 adopt OSHA standards and the OSHA enforcement process.

24 In doing so, DOE and its contractors would gain a
25 great deal of credibility in the eyes of the work

1 force, the public, and Congress, by operating under the
2 same safety rules and standards as the rest of America.

3 Battelle will be submitting more detailed
4 written comments to DOE later this week. We
5 appreciate the opportunity to speak freely today on
6 this most important matter, and thank you for allowing
7 us to provide these comments.

8 That ends our statement. I would be glad to
9 answer any questions that you have.

10 MS. ROGERS: No, there are no questions.

11 (Pause.)

12 MS. ROGERS: Is Sylvia Kieding there?

13 MR. BISTLINE: Yes, she is.

14 MS. KIEDING: I am here.

15 MS. ROGERS: Okay. The next speaker will be
16 Sylvia Kieding, I call Sylvia Kieding.

17 PRESENTATION BY SYLVIA KIEDING:

18 MS. KIEDING: My name is Sylvia Kieding, and I
19 am a consultant to the PACE international Union. And
20 today I wanted to speak on behalf of the PACE Atomic
21 Energy Workers Council about DOE's December 8 Notice of
22 Proposed Rulemaking, 10 CFR 851.

23 PACE International Union represents
24 approximately 300,000 workers in the paper, chemical,
25 oil, atomic and other industries. PACE represents the

1 majority of hourly production, maintenance and
2 environmental remediation workers at former nuclear
3 weapon sites. PACE is also the successor to the Oil,
4 Chemical and Atomic Workers Union. PACE represents
5 workers at sites including Hanford, IMEEL, Brookhaven,
6 Oak Ridge, K-25, Portsmouth, Paducka, Mound, Oregon
7 East and Oregon West, Whip and Grand Junction Project
8 Office.

9 Section 3173 of the Defense Authorization Act
10 of 2003 and the accompanying report language, clearly
11 call for DOE to propose regulations to make its order
12 440.1A, Health and Safety, enforceable with civil
13 penalties.

14 Such regulations according to Section 234C,
15 such regulations shall provide a level of protection
16 for the workers at such facilities that it is
17 substantially equivalent to the level of protection
18 currently provided to such workers at such facilities.

19 In the report language to that section, then
20 it says that the provision would also direct the
21 Secretary to promulgate industrial and construction,
22 health and safety regulations that incorporate the
23 provisions of DOE Order Number 440.1A and would make
24 them enforceable with fines.

25 Clearly, DOE's proposed rule goes against the

1 language and intent of Section 234C and allows each
2 contractor to police themselves. A classic example of
3 the fox guarding the chicken house.

4 DOE has the responsibility to ensure that
5 workers at GGE sites are protected from job safety and
6 health hazards. This proposal dilutes that protection
7 and we request that DOE withdraw this proposal and
8 issue a new one. The intent of Congress in amending
9 the Atomic Energy Act was to promulgate regulations
10 that codify DOE Order 440.1A and make it enforceable
11 rather than relying exclusively on a contractual
12 approach to establishing safe and healthful work place.

13 However, Congress did not direct DOE to remove DOE
14 Order 440.1A as a component of establishing a safe and
15 healthful work place. Instead of following the
16 congressional directive, DOE has downgraded the order
17 to a guidance document and has chosen to twist the
18 language on flexibility to allow each contractor to
19 develop its own safety plan subject to the approval of
20 a DOE program office. The flexibility language
21 contained in Section 234C embraces special
22 circumstances as a facility that is to be closed and to
23 achieve national security missions of the Department of
24 Energy. Yet, DOE has expanded that flexibility clause
25 to mean that every contractor can develop its own

safety program with its own exemption.

2 Section 851.A1 of the proposal would make
3 clear to contractors and DOE officials that guidance
4 documents do not create legally enforceable
5 requirements. Section 851.8 says that DOE officials
6 are prohibited from inspecting or investigating a DOE
7 site, to identify violations of proposed regulations,
8 by determining whether a contractor's actions or
9 admissions were consistent with the guidance document.

10
11 The current DGE Order 440.1A contains the
12 OSHA Industrial and Construction standards that are
13 enforceable contractually. DOE's proposed rule makes
14 any enforcement impossible unless the contractors
15 specifically includes them in their safety plan. In
16 that safety plan, the contractor identifies the
17 hazards, where they occur, and how they will be
18 contained. Based on that program, the DOE is allowed
19 to investigate only the identified hazards and work
20 area. The Agency can then levy fines on contractors
21 who violate their own written health and safety
22 programs. Enforcement reliance on self reporting so
23 that boils down to the contractors setting their own
24 speed limits and writing their own speeding tickets.

25 A few years ago at the Oakridge K-25 site,

1 DOE and the contractor denied there were any building
2 with beryllium exposure. It was not until a worker
3 developed chronic beryllium disease that DOE discovered
4 there were 27 buildings with beryllium exposure.
5 Workers at X-25 were also concerned about cyanide
6 vapors and complained of people getting sick from these
7 vapors. The contractor denied there was any cyanide at
8 the site, but later it was discovered that the sludge
9 at the TSCA incinerator contained cyanide. So, how
10 effective was self policing and self reporting in these
11 cases?

12 The proposed rule also calls for the
13 contractor to set work place health and safety
14 standards that are equal to the level of protection
15 that existed in 2002. Now, let's consider the
16 practical impact of allowing the contractor to develop
17 such health and safety standards that would equal 2002
18 protection.

19 The Government Accountability Project, the
20 Government Watchdog Group has compiled a report on the
21 Hanford Tank Farms that documents chemical vapors
22 exposure events, requiring medical attention in 2002
23 and 2003. There were 38 chemical vapor exposure
24 events requiring medical attention in the 19 months
25 between January 2002 and July of 2003. There were an

1 additional 43 chemical vapor odor complaints in 2002
2 alone. So, developing standards equal to the
3 protection that existed in 2002 is scant assurance to
4 the sick workers at Hanford working on the Tank Farms.

5 If the Hanford contractor did not identify or
6 characterize the toxic tank formed vapors, and thus,
7 did not include them in their health and safety plan,
8 DOE would be barred from conducting any investigation.

9 The only safety standard that DOE makes
10 enforceable in its proposed rule, is the DOE Beryllium
11 Rule, 10 CFR Part 850. We support the enforcement of
12 Part 850. Ecwever, we understand that the workers at
13 USEC are not protected under Part 850 because the DOE
14 rule does not apply to DOE leased areas. We,
15 therefore, recommend that DOE amend and extend Part 850
16 to USEC lease sites with respect to minimum levels of
17 exposure, decontaminate requirements and rate retention
18 protection. Currently there are a USEC worker with
19 current beryllium disease but no symptoms, who is not
20 permitted on site, and will lose his job. USEC is
21 governed by OSHA regulations and OSHA does not have a
22 beryllium standard.

23 DOE's approach in this proposed rule drills
24 holes through the minimum Safety floor Currently
25 established with DOE Order 440.1A, and workers are

1 concerned that they are going to fall through the holes
2 in that floor.

3 The DOE has previously noted in the early
4 '90s, that DOE embraced the notion of "least inference
5 with contractor safety" and based on an undocumented
6 policy of "blind faith" in contractors. Obviously that
7 holds true today and this Council wonders what unsafe
8 and unhealthy working conditions such blind faith
9 relegates the workers to endure.

10 Members of the PACE Atomic Energy Workers
11 Council recommend that the current DOE Order 440.1A be
12 the floor for setting standards. DOE should also
13 incorporate NIOSH recommended permissible exposure
14 limits that may be more protective than OSHA PEL's or
15 the ACGIH threshold limit values which are often 30
16 years old. We also recommend that DOE promulgate
17 regulations that contain the same level of worker
18 rights as OSHA standards concerning confidentiality of
19 complaints and the ability to participate as a party in
20 settlement agreements. The regulation should enlarge
21 the definition of refusing unsafe work to include not
22 only the eminent danger of death or serious bodily
23 injury, but also uncontrolled exposures to carcinogens,
24 radionuclides, corrosives, ammonia or other hazards.

25 further, we recommend that the regulations

apply to every worker on site. We also request that
2 DOE hold a meeting like today, in Hanford by tele
3 conference. The Hanford PACE local had previously
4 requested a Hanford hearing on the rule, but was told
5 that DOE did not have the travel funds. Using the tele
6 conference as a vehicle would clear up the problem of
7 travel funds.

8 Based on the fact that this proposed rule
9 decreases workers safety in convention of congressional
10 direction, this Council respectfully requests that DOE
11 withdraw the proposal and issue a new proposal that
12 fully addresses the directives of Section 3173 of the
13 Defense Authorization Act of 2003 and the accompanying
14 report language.

15 Thank you. And we will be submitting more
16 remarks later in the week.

17 MR. BISTLINE: Thank you.

18 MS. ROGERS: Thank you. Sylvia, do you have a
19 copy to give to Bob today of your statement?

20 MS. KIEDING: I have one, but it is, I have
21 got some marks on it.

22 MS. ROGERS: Do you have an electronic version
23 of it?

24 MS. KIEDING: Not with me. At home, of
25 course.

1 MS. ROGERS: If you could e-mail an electronic
2 version of it, that would be fine.

3 MS. KIEDING: Yeah, that is what ycu had said
4 yesterday, that I could e-mail you the electronic
5 version.

6 MS. ROGERS: Okay.

7 MS. KIEDING: So that is what I had planned to
8 do, otherwise, I wouldn't have check marked some of
9 these paragraphs.

10 MS. ROGERS: Okay. That is fine.

11 MS. KIEDING: Is that okay, then?

12 MS. ROGERS: That is fine.

13 MS. KIEDING: Okay. Good.

14 MS. ROGERS: Yes.

15 MS. KIEDING: Okay. Thank you. And I had
16 wanted to submit the names of the various locals in the
17 electronic submission, okay.

18 MS. ROGERS : Okay.

19 MS. KIEDING: Okay. Thank you.

20 MS. ROGERS: Thank you.

21 The next speaker is John Ahlquist.

22 (Pause.1

23 MR. BISTLINE: While John is coming up, is
24 there anyone in the room that desires to speak that
25 hasn't scheduled, unscheduled, okay. Thank you.

1 John?

2 PRESENTATION BY JOHN AHLQUIST:

3 MR. AHLQUIST: Thanks, Bob.

4 MS. ROGERS: I am sorry, I am sorry, before
5 John starts to speak, Ben McRae has joined me here in
6 the Washington, C.C. office.

MR. BISTLINE: Okay. Thank you.

8 MR. AHLQUIST: Hello to Jackie and Ben in
9 Washington and Bob.

10 I appreciate the opportunity to appear here
11 today. My name is John Ahlquist, I am a former DOE
12 employee and now I am the Deputy Director for
13 Environment Safety and Health in the Laboratory
14 Administration Office of the University of California
15 Office of the President. The Laboratory Administration
16 Office has over site in management responsibility of
17 the three National Laboratories, Lawrence Livermzre,
18 Lawrence Berkeley, and Los Alamos National Labs, by the
19 University of California for the Department of Energy
20 and the National Nuclear Security Administration.

21 The comments I have today represent the
22 consensus of our office and these three national
23 laboratories.

24 In responding to congressional intent, we
25 appreciate that the Department of Energy is proposing

the regulation that seeks to capitalize on the progress
2 that has been made in workers safety and health in DOE
3 complex over the last decade and to build on processes
4 that are already in place at its contractor run sites.

5 It is noteworthy that DOE proposal to allow the
6 contractor the flexibility to select the standards,
7 procedures, controls, and work processes to use in
8 achieving safe and healthy work places and implementing
9 its worker safety and health program. To ensure that
10 the basics workers safety requirements are covered, DOE
11 could require that OSHA regulations be part of the
12 contractor's workers safety and health plan. Other
13 standards, controls and work processes would be covered
14 through the Work Smart Standards Process, which has
15 been a part of, an integral part of the Integrated
16 Safety Management System at DOE sites for several
17 years.

18 DOE has focused on the essential elements of
19 ISM and has expressed this intent, this rule be
20 complimentary to ISM. Furthermore, DOE has taken a
21 positive step in this rule by excluding guidance
22 documents from being legally enforceable under the
23 provisions of the proposed rule unless they are
24 specifically included in the workers safety and health
25 program submitted by the contractor and approved by

1 DOE.

2 We have some areas of major concern, however.
3 The first one is right at the beginning in 851.2.1 on
4 the exclusions. The proposed rule excludes entities
5 regulated by OSHA as of December 2, 2002, but does not
6 make any provision for an entity that might come under
7 OSHA regulation after that date. Since there is an
8 effort in some quarters to go to external regulations
9 in the Office of Science Facilities, provision must be
10 made in this rule to provide an exclusion for other
11 entities that might come under OSHA regulation to avoid
12 duplicate and potentially confusing dual regulation or
13 DOE having to back a regulation or creating exemptions.

14 In Section 851.102, Approval of the Worker
15 Safety and Health Program. Approval of the safety and
16 health program should state that this function will be
17 delegated to the site office where the responsibility
18 for the program resides. The site office closes, to
19 the operations understands the hazards and the issues
20 associated *with the operations and the office for the
21 risk is accepted for DOE, and if not, disapproved at
22 the end of 180 days, the program should automatically
23 be improved. This is the best way to ensure that we
24 have timeiiness and if we don't get approval within six
25 months, we don't have to shut the site down.

And then we have concern on the coverage of
2 sub-contractors. If all sub-ccntractors and suppliers
3 are included in the definition of sub-contractors, is
4 each company does work on a DOE site, subject to
5 enforcement and penalties directly from DOE? If that
6 is the case, changes must be made for these contracts,
7 notify these companies of the consequences associated
8 with 10 CFR 851. This will become a major disincentive
9 for a company that routinely operates in the private
10 sector where an average OSHA serious violation is
11 \$977.00 for the maximum of \$7,000.00 as opposed to a
12 DOE serious violation of the maximum penalty of
13 \$70,000.00. Under the proposed rule, companies will
14 be faced with placing resources into identifying OSHA
15 violations daily in order to reduce their risk of
16 potential extreme penalties. This will certain?;; drive
17 up the cost of sub-contracting to DOE sites.

18 On Section 208, there are no provisions for
19 third party judicial review in the proposed rule. The
20 system as it is now set up, has DOE writing the
21 regulations, interpreting them, and then conducting a
22 final review of the violations. An opportunity to
23 challenge a proposed civil penalty either before an
24 administrative law judge, or a United States District
25 Court as provided in the Code of, in USC 2282(a) (c) in

tendency of third party 20 and similar provision should
2 be provided in this proposed rule. In addition, ALJs
3 routinely hear OSHA cases and have greater familiarity
4 with OSHA requirements and case law.

5 And then also DOE should make interpretation
6 or implementation of this rule as consistent as
7 possible with OSHA. This would include using the OSHA
8 definitions of serious, other than serious and
9 diminimus, adopting a similar review process using
10 OSHA's interpretations where OSHA standards are invoked
11 and devising a penalty structure consistent with OSHA.

12 There should also be a provision for an incentive
13 program such as the Voluntary Protection Program.

14 Most of the workers at DOE sites are
15 employees private sector companies which, with which
16 DOE contracts or sub-contracts. DOE has adopted most
17 of OSHA regulations as a foundation for its own
18 regulator; program. As proposed, this rule will
19 establish two separate and distinct OSHA programs under
20 which DOE contractors will be operating in this
21 country.

22 DOE also needs to formally establish
23 reporting threshold for items of non compliance, that
24 should be reported to the non compliance tracking
25 system. cost to implement the program are not known

1 until the thresholds are developed.

2 DOE expects the contractors that will have in
3 place internal compliance programs which will ensure
4 the detection, reporting and prompt correction of
5 worker protection related problems as they make
6 constitute or lead to violations of workers safety and
7 health requirements. Before, rather than after, DOE
8 has identified such violations. This will require
9 additional resources to document many other than
10 serious and diminimus findings, a large number of which
11 are not significant. The use of contractor resources
12 in this program will potentially detract for the more
13 serious issues like nuclear operations and becomes a
14 disincentive to establish additional best practices in
15 the workers safety and health program because they
16 become, they, too, can become subject to penalties.

17 In one of the ones that also really bothers
18 us is the question of legacy issues continues to be a
19 major concern to contractors at DCE sites, since many
20 are sites are 40 to 50 years and do not meet current
21 OSHA requirements. The statement of Gerald Mande
22 from, who was a DAS for Labor in OSHA, speaking before
23 the U.S. House of Representatives on March 22, 2002,
24 talked about these legacy issues. And he said, "In
25 1998 and 1999 OSHA conducted a pilot project at

1 Lawrence Berkeley Lab, Oakridge National Lab, and the
2 K-25 site. At these sites, OSHA conducted simulated
3 inspections to study the potential impacts of external
4 regulation. These pilot projects clearly demonstrated
5 to OSHA that OSHA external regulation would have a
6 significant impact on DOE's current operating practices
7 due to the existence of legacy hazards. Legacy hazards
8 are site hazards that have been self identified by DOE,
9 but not corrected because of budget constraints.
10 Limitations on budgetary resources led DOE to
11 privatized its treatment of identified hazards based on
12 a potential severity and likelihood of occurrence. When
13 DOE first identifies hazards, it may not be able to
14 correct them right away. Rather than, rather it will
15 prioritize the hazards, take appropriate interim
16 measures and then attempt to obtain full funding to
17 fully address the hazard permanently. Until DOE
18 eliminates such hazards, they are known as legacy
19 hazards. Any move toward external regulation must
20 include a careful assessment of these legacy hazards
21 and a plan for abating them. The cost of correcting
22 legacy hazards is likely to be significant, but is
23 important to recognize that these hazards need to be
24 addressed."

25 Most responsible comments will document

1 legacy safety and health issues and conduct a baseline
2 of OSHA violations prior to the effective date of the
3 proposed rule. Many of the legacy issues are
4 associated with facility deficiencies that met
5 requirements in place of the time they were
6 constructed. The examples include inadequate
7 stairways, egress, electrical systems, fire protection
8 and so forth. And the rule contains no provision for
9 variances or permanent exemptions, which is necessary
10 to deal with legacy issues. And under that, in the
11 regulation, itself, under the Notice of the Violation,
12 in (1) (c) it says DOE contractors are not ordinarily
13 cited for violations resulting from matters not under
14 their control. However, it does on to say, with regard
15 to the issue of funding, however, DOE does not consider
16 an asserted lack of funding to be a justification for
17 non compliance of the workers safety and health
18 requirements. And this leads to a lot of concern in
19 the legacy area.

20 Then we have several, we will have comments
21 on various definitions and so forth. And I will just
22 spell out a few of them.

23 Under the definition of contractor, please
24 clarify the meaning of entity and affiliated entity?
25 The definition of remedy is confusing and mixes legal

1 remedy with actual corrective action.

2 And you should clarify at the limitation on
3 fines to the fees paid to the entity as for OSHA only
4 or it is for OSHA plus PAAA fines.

5 And then on the maintaining complete and
6 accurate records and all material respects, the terms
7 complete, accurate and material respects are
8 unmeasurable and potentially the problems. We
9 recommend rewording to a contractor shall develop and
10 retain records and information in accordance with the
11 standards identified in the contractor's workers safety
12 and health program. And then there was, we have got
13 several others, but then we have several questions,
14 too, that we would like perhaps considered.

15 If a contractor is responsible for one or
16 more work places at a DOE site, must establish or
17 maintain a workers safety and health program for those
18 work places. Does the prime contractor have to
19 establish and maintain a single worker safety and
20 health program for all of its sub-contractors who
21 perform work on the site?

22 Another question, will contractors hired by
23 DOE to perform work on a site who are not part of the
24 management and operating contractor be subject to these
25 requirements? And for example, Los Alamos we have the

1 Los Alamos site office directly contracting to have a
2 roof repaired on and they are also directly contracting
3 to do environmental restoration work and we wouldn't
4 know, we are not too sure where we would fit as a
5 University in that situation.

6 And also has DOE evaluated the reporting
7 burden of a contractor tracking violations on a daily
8 basis?

9 We will also include more formal comments
10 and the things we submit on Friday and I will try to
11 clean these up and get you an electronic copy later
12 today. And I will send it to Bob and to you, Jackie.

13 MS. ROGERS: Okay. Thank you.

14 Bob, do you have any questions?

15 MR. BISTLINE: Not at this time, Jackie.

16 MR. AHLQUIST: Thank you.

17 MR. BISTLINE: Thank you, John.

18 MS. ROGERS: Do you have anyone there that
19 would like to make an unscheduled speech, presentation,
20 comment?

21 MR. BISTLINE: Anyone that would like to make
22 comments or such?

23 Okay. I don't think so, Jackie. It doesn't
24 appear.

25 (Pause.)

1 MR. SAYE: I just have one --

2 M? . BISTLINE: Yes.

3 MR. SAYE : Could I get the --

4 m,. BISTLINE: Can you identify yourself?

5 MR. SAYE: Yes, I am Joe Saye with Bechtel
6 BWXT Idaho.

7 MR. BISTLINE: Okay. Could you come up here,
8 so that we can also record? Excuse me for doing it to
9 you.

10 (Pause.)

11 MR. SAYE: Okay. I am Joe Saye with Bechtel
12 BWXT Idaho. All I wanted to do was get the address
13 again, Jackie, where the transcript of this hearing is
14 going to be available. You read through that earlier.
15 I didn't get all of it.

16 MS. ROGERS: Okay. The website address is
17 <http://www.doe.gov/whs/rulemaking>, I am sorry,
18 www.eh.doe.gov/whs/rulemaking.

19 MR. SAYE: Thank you very much.

20 MS. ROGERS: You are welcome.

21 (Pause.)

22 MS. ROGERS: Well, at this time, there are no
23 more speakers present, so we are going to have close
24 and when other speakers, the hearing will be scheduled
25 there until, from nine to one. So, we ask that Bob

1 and I will remain until one o'clock, three o'clock
2 Eastern time to accept any other comments or
3 presentations that may come in. But, will the reporter
4 say if we can close now and be opened when other
5 speakers appear.

6 (Whereupon, at 9:40 a.m., the meeting was
7 recessed until 1:00 p.m., this same day, Wednesday,
8 February 4, 2004.)

9 MS . ROGERS: At this time we do not have any
10 other scheduled speakers, therefore, on behalf of the
11 Department of Energy, I would like to thank all of you
12 for participating in this rulemaking process. This will
13 conclude the Public Hearing for the Department of
14 Energy's Notice of Proposed Rulemaking for 10 CFR Part
15 851, Workers Safety and Health in Golden, Colorado and
16 in Washington, D.C. via tele video.

17 (Whereupon, at 12:33 p.m., the Public Hearing
18 was concluded.)

1 REPORTER'S CERTIFICATE

2
3 This is to certify that the attached
4 proceedings before:

5 UNITED STATES DEPARTMENT OF ENERGY
6 In the Matter of:

7 10 CFR 851 - WORKER SAFETY AND HEALTH NOTICE OF
8 PROPOSED RULEMAKING (NOPR)

9 were held as herein appears and that this is the
10 original transcript thereof for the file of the
11 Department, Commission, Board, Administrative Law Judge
12 or the Agency.

13 Further, I am neither counsel for or related
14 to any party to the above proceedings.

15
16
17 *On the Record Reporting*
18 Official Reporter

19 Dated: February 9, 2004